No. 22,479

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALVIN J. SMITH,

Appellant,

vs.

E. L. CORD, Individually, E. L. CORD, doing business as Los Angeles Broadcasting Company,

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an interlocutory appeal from an order entered on September 26, 1967, by the United States District Court for the Central District of California, which order disqualified George O. West as attorney for appellant Calvin J. Smith [CT 92-94].[1] The underlying action is based upon a complaint filed on March 5, 1964, which alleged that appellee was indebted to appellant for money had and received in the sum of $3,000,000,000 and also requested exemplary damages in the sum of $3,000,000,000 for alleged fraud, malice

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[1]CT refers to the Clerk's Transcript on appeal.

and oppression by appellee. The District Court's jurisdiction was invoked under 28 U.S.C. 1332(a)(1).[2]

The District Court provided in paragraph four of its order [CT 95-96]:

> "Pursuant to the provisions of 28 U.S.C. 1292(b) the order disqualifying Mr. West involves a controlling question of law as to which there is substantial grounds for difference of opinion, and an immediate appeal from that order may materially advance the ultimate determination of the litigation."

Although this statement is cited in the Notice of Appeal filed herein [CT 100, lines 23-26], appellant believes that the order is appealable under 28 U.S.C. 1291 since the order as to attorney West is final and the decision therefore belongs to that exceptional class of cases described in *Cohen v. Beneficial Indus. Loan Corp.*[3] If this position proves incorrect appellant respectfully requests that the Court of Appeals permit the appeal pursuant to the discretionary provisions of 28 U.S.C. 1292-(b).

Statement of the Case.

1. History.

The action was filed on March 5, 1964, and appellant asked for general and punitive damages in a complaint based on a common count for money had and received.

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[2]The present case has been before the Court twice. A summary of the action, together with the text statement, is found in *Cord v. Smith* (9th Cir. 1964), 338 F. 2d 516, 518. Also see Civil Docket herein, CT 115.

[3](1949), 337 U.S. 541, 546; see also *Harman Drive-In Theatre v. Warner Bros. Pictures* (2d Cir. 1956), 239 F. 2d 555, 556.

Acting on appellee's petition under the All Writs Act, this Court made the following order on November 4, 1964:

> "The trial court is directed to set aside the order denying the motion to disqualify and for injunctive orders, filed in the trial court on May 28, 1964, and further directed to order that Lyndol L. Young, Esq. shall not at any time, directly or indirectly and whether as attorney of record or not, represent, counsel or advise plaintiff Calvin J. Smith in connection with his action."[4]

The Court's mandate was spread in the District Court on April 26, 1965 [CT 115].

The application of the above mandate, however, was far from complete. After the mandate was spread attorney Young filed his own action in the District Court in which he incorporated by reference the action by appellant and further alleged that appellant had assigned to him one-half of appellant's cause of action against appellee. This complaint led ultimately to a clarification of the Court's mandate in the second case of *Cord v. Smith*.[5] The Court there held, *inter alia:*

> "We do hold that under our mandate, Young is not entitled to participate in the case in any manner, either as an attorney or as a party, or to maintain an action against Cord based upon the claimed assignment. And he may not, as we indicated in our prior opinion, assist Smith or his attorney by consultation or advice. The pending case of Young v. Cord should be dismissed."[6]

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[4]*Cord,* footnote 2, *ante* p. 2, 338 F. 2d at 526.

[5](9th Cir., 1966), 370 F. 2d 418.

[6]*Id.,* 370 F. 2d at 424.

In footnote 10 of the above decision the Court commented that Young had indicated, during oral argument, that he no longer desired to participate in the action either as a party or as an attorney, and further stated that "presumably, therefore, the case . . . can now proceed to trial in due course."[7] The concurring opinion of Circuit Judge Chambers was more prophetic: "I hope that the decision will permit Messrs. Smith and Cord to get on with their suit in the district court, but I am not sure it will."[8]

The Court's clarification of its mandate was duly spread on the records of the United States District Court on April 25, 1967 [CT 114].

2. Facts Underlying the Present Appeal.

Approximately three months after the Court's mandate was spread, on July 24, 1967, appellee filed a Notice of Motion To Require Compliance With Mandate And Motion To Disqualify Plaintiff's Attorney. This motion requested that the District Court determine whether the present attorney of record for appellant, attorney George O. West, was qualified to represent appellant [CT 15]. Affidavits in support [CT 16] and in opposition to this motion (filed separately with the Clerk of the Court) were filed by Milo V. Olson, and George O. West, respectively, and Mr. Olson later filed a reply affidavit [CT 81]. Appellee's motion to disqualify was consolidated with appellee's motion for change of venue and both came on for hearing on August 7, 1967 [RTD 4].[9] In a written order filed

[7] *Id.*, 370 F. 2d at 424, footnote 10.

[8] *Id.*, 370 F. 2d at 425.

[9] RTD refers to the Reporter's Transcript of disqualification hearing before the United States District Court on August 7, 1967.

September 26, 1967, the Honorable Warren J. Ferguson, judge presiding, entered an order disqualifying appellant's attorney George O. West [CT 94]. The Court stated [CT 94]:

> "The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without 'assistance by consultation or advice' from Mr. Young. Such assistance has been given in the past and there is no reason to believe that it will cease in the future."

Plaintiff Smith and his attorney George O. West filed their Notice of Appeal from this order on October 5, 1967 [CT 100].

The alleged "facts" used by appellee to support his motion to disqualify, and relied upon by the Honorable Warren J. Ferguson in reaching his decision, are discussed during the Argument as required.

Specification of Errors Relied On.

1. The District Court erred in disqualifying attorney George O. West because the evidence was insufficient to support such an order.

2. The District Court erred in denying appellant a hearing on the motion to disqualify and sufficient time to prepare and present witnesses and other evidence pertinent thereto.

ARGUMENT.

I.

The Evidence Introduced by Appellee Was Insufficient to Support the District Court's Order Disqualifying Attorney George O. West.

The only evidence presented to the District Court in support of the motion to disqualify is contained in the Affidavit and Reply Affidavit of Milo V. Olson, attorney for appellee [CT 16-36, 81-87]. The primary question on appeal is whether these affidavits contained sufficient facts to support the District Court's order of September 26, 1967, which disqualified George O. West as attorney for appellant Smith.

One point should be clarified prior to appellant's analysis of the evidence. The District Court did *not* rule that attorney West did not have the right to represent Smith. The Court held that Smith did not have the right to retain attorney West because this representation would violate the prior mandates of this Court due to the "close" relationship between attorneys West and Young [CT 93; see also discussion of this point at RTD 13-14]. That is, the question of whether a given party's second attorney could take any steps necessary to acquire confidential information from the party's first attorney, who has been disqualified due to his representation of an adverse party, would not seem to be directly presented by this appeal.

To support the motion to disqualify appellee presented approximately fifteen "facts" to the District Court, together with Points and Authorities and some correspondence with the American Bar Association which supposedly dealt with a problem involved in the present case [CT 79-80; 83-88]. Although the American Bar

Association informed attorney for appellee on June 5, 1967, that the "committee will not render opinions as to the ethics of conduct of a lawyer in a matter in which such conduct is involved in pending litigation" [CT 87], attorney Olson included the Association's later letter of July 1, 1967, in the Points and Authorities supporting the motion [CT 79-80]. Appellant will deal with this opinion of the American Bar Association as it arises.

The fifteen "facts" supporting appellee's motion can be analyzed under four general headings. Appellant realizes that individual acts, innocuous in themselves, can become greater than their sum when combined and sufficient to support a given judgment. However, appellant believes the following argument demonstrates how little evidence, if any, the affidavits contain to support the disqualification of attorney West. It is true that appellee's motion to disqualify was also directed toward the conduct of appellant Smith, which might justify a portion of attorney Olson's lengthy affidavit, but appellant submits that the affidavit was largely an attempt to remove attorney West because of mere physical proximity to Lyndol Young.

1. *Disqualification Due to Joint Appearance.* Appellee apparently condemns attorney West for physically appearing with Mr. Young on three different occasions. First, West appeared with Young at the deposition of West's client, appellant Smith, on June 23, 1965, and thereupon refused attorney Olson's demand that West request Young to leave [CT 16-17]. Young explained at the deposition that he was a party to the action since a complaint filed by him against Young had been consolidated with the present case. Mr. West refused to

ask Mr. Young to leave because he knew "of no legal basis at this moment" why he should accede to Olson's demand [CT 17, lines 10-11]. The two actions had not in fact been consolidated even though they were both pending before the same judge.[10] Appellant suggests that this incident only proves that Young and West both appeared in the same room and that attorney West was mistaken as to either the facts or the law. It certainly does not show either collusion or that West was acting after "consultation or advice" by Mr. Young [Court's order of disqualification, CT 94].

Second, West is also censored for accompanying Young to a court hearing on a matter collateral to this action [CT 19, line 19, to 20, line 20]. Appellant can see no other reason for the lengthy presentation of this incident other than to bring to the attention of the District Court an alleged maneuver *by Lyndol L. Young* and to thereafter burden *West* with guilt by association. The nature of Young's action is not set forth in the affidavit and Smith's connection with it is therefore impossible to determine. But even if Smith was not involved in any manner with Young's suit, appellant does not and can not believe that this Court's mandate means that appellant's attorney, whoever he may be, can not be seen with Lyndol L. Young without incurring the risk of disqualification.

Third, affiant Olson takes one and one-half pages to outline activities of Mr. Young and again comes to the underscored conclusion that West and Young appeared at a committee hearing in Los Angeles [CT 21, line 28, to 23, line 12]. The same observations made above are

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[10]The background and incident itself are detailed in *Cord,* footnote 4, *ante* p. 3, 370 F. 2d 420.

applicable here. In addition, affiant Olson admits that these committee hearings were so relevant to the present case that appellee and Olson's co-counsel attended [CT 23, lines 3-5]. Surely appellant's attorney had the same right.

2. *Association Through Correspondence.* Appellee objects to the fact that on two occasions Young apparently obtained letters sent to West by affiant Olson and responded, vehemently, to him [CT 17, lines 16-23; 20, line 22, to 21, line 27]. Olson's affidavit does not reveal whether West transmitted Olson's letters to Young or whether, which is equally possible, West told Smith and Smith told Young. In any event the continued participation of Young in the action is explained in his letter of January 20, 1966, to Olson. Young believed that his action had been consolidated with Smith's before United States District Judge Whelan and that Young had been made a party respondent to the second case then pending in the Court of Appeals [CT 71, first paragraph]. Further [CT 71, first paragraph]:

> "You, therefore, should send me copies of your communications with Mr. George O. West who is Mr. Smith's attorney. I always show your client Cord the courtesy of sending him copies of my letters to you, including a copy of this letter."

Both Olson [CT 21, lines 21-27] and the District Court [CT 93, lines 21-29] quoted the following portion of Young's letter of January 20, 1966, and failed to include the explanatory clause which is emphasized [CT 72, third paragraph]:

> "You are again advised that there are no possibilities of any kind of your making a settlement in

> this litigation. There never has been and there never will be a settlement of this litigation without my consent, *which is necessary because of my rights as an assignee.*"

On January 20, approximately eleven months before this Court's clarification of its mandate in the second case of *Cord v. Smith,* appellant submits that Young's position as a party to a consolidated action, and any conduct by West based upon that assumption, was tenable. This Court noted in its second opinion that there was "sharp disagreement between the parties as to whether our mandate would prevent Young from proceeding in the case as an assignee," and only decided the issue due to the "exceptional nature of the question presented."[11] Appellant does not believe that he, or his attorney, should be penalized for acts based upon a decision which was not then in effect.

3. *Joint Appearance During Motion for Clarification.* In connection with appellee's motion for clarification in 1966, appellee now complains, first, that Young and West appeared jointly on that motion and the points and authorities submitted therewith [CT 17-18]. Since both Smith and Young were parties to the motion, and obviously aligned on the same side, appellant submits that this joint effort was proper *before* the Court's clarification.

Second, appellee accuses West of allowing Young to prepare two affidavits which were submitted by Smith during the motion [CT 18-19]. This fact is not supported by Mr. Olson's affidavit. Certain "testimony" by Smith is quoted by affiant Olson to the effect that

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[11] *Id.,* 370 F. 2d at 424.

Young prepared Smith's affidavits [CT 24, lines 18-25], but these statements are quoted out of context and are also hearsay and incompetent. As urged by attorney West at the hearing on appellee's motion to disqualify, if the District Court were going to consider this alleged testimony the entire record should have been brought forward and Smith's statements considered in context. Further, even if this accusation were true, Young was a party to the motion, the statements contained in the affidavits were pertinent to most of the motions then pending before the Court, and appellant does not believe that any aid which he allegedly rendered Young in Young's Suit was in violation of this Court's mandate *at that time.* As implied by this Court in its second opinion, the posture of the case during this period was so confused that an extraordinary remedy was required, the complete dismissal of Young's suit. Appellant again submits that he should not be penalized in almost an *ex post facto* manner.

4. *Association by Proximity.* It is significant that not one of the above incidents described by affiant Olson occurred after this Court's decision in December of 1966. The District Court stated that "such assistance has been given in the past and there is no reason to believe that it will cease in the future" [CT 94, lines 8-9], without observing that the position of Young, and the concomitant duties of Smith and West, were far from clear when the conduct related by Olson took place. Appellant undoubtedly cannot argue on this appeal that appellee waived his objections to attorney West, since the rights of Smith under the mandate are involved and not the rights of West [RTD 12-13], but appellant can object to the use of supporting facts

which were generally before the Court of Appeals on its clarification of mandate and arose as a direct result of the confusion which led to that clarification. There is a compelling reason to believe that such activity, if pertinent at all, "will cease in the future": the clarification of mandate rendered by this Court.

Aside from these prior incidents the main thrust of appellee's position seems to be that since Mr. West and Mr. Young had and presumably still have offices in the same suite they will be working "in obvious close association" during the pendency of the action [CT 23-24]. The District Court relied in part upon this fact [CT 93, lines 19-20].[12]

When a partner[13] or an associate[14] of a law firm has represented a given party in the past, the remaining members of the firm, including even law clerks,[15] are thereafter disqualified from taking a position which is adverse to that party on substantially the same matter. The rules are applied with extreme rigor in order to avoid both the "disintegrating erosion of particular exceptions" noted in *Cord v. Smith*[16] and the suspicion of conflict which would otherwise arise.

Appellee [CT 75-77] Henry S. Drinker,[17] apparently the American Bar Association [CT 79-80], and the

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[12]The allegation by Olson that Young and West had a joint lease on the suite involved, although undenied, is admittedly hearsay and incompetent [CT 24, lines 7-10].

[13]*Consolidated Theatres, Inc. v. Warner Bros. Cir. Man. Corp.* (2d Cir. 1954), 216 F. 2d 920.

[14]*Fisher Studio, Inc. v. Loew's Inc.* (.....), 232 F. 2d 199, cert. den. 352 U.S. 836.

[15] *Consolidated*, footnote 13, *ante* p. 12.

[16]*Cord*, footnite 2, *ante* p. 2, 338 F. 2d at 525.

[17]Drinker Legal Ethics (1953 Columbia University Press, N.Y.) p. 106.

Honorable Warren J. Ferguson would extend the above principle, together with its rigid application, to those attorneys who share a common office suite. Bluntly stated, the proposition is:

> "Two lawyers who share offices, although not partners, bear such close relations to one another as to bring Canon 6 into play."[18]

Canon's 6 and 37 are set forth in Appendix A.

Appellant contends that such a fact, by itself, cannot be law. In general the partnership and associate rules are rigorously enforced since exceptions might ultimately destroy them and a sufficient connection between the two attorneys involved is apparent from their association: the attorneys are in fact closely associated and are expected to consult and advise one another when necessary. These facts cannot be posited when two attorneys have offices in the same suite, on the same floor, or on different floors of the same buildings. There is absolutely no *a priori* reason to assume that two attorneys will advise and consult with one another merely because each pays his share of the rent. Such close association could indeed be the case, but until that conduct were shown as a matter of fact appellant submits that the new attorney should not be disqualified. Adherence to the flat rule proposed by Mr. Drinker and the American Bar Association would create an irrebuttable presumption which is unfounded in the experience of most attorneys and would of course deprive many attorneys of clients and income without the reciprocal advantages of a partnership or association.

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[18]A.B.A. Informal Opinion 284, as quoted CT 79.

Appellant has not discovered any cases in point.[19] *Laskey Bros. v. Warner Bros. Pictures,*[20] at least illustrates appellant's position and the hesitancy of the courts in extending the inflexible rules discussed above. In *Laskey* attorney Isacson represented two defendants on closely related matters and later formed a partnership with attorney Malkan. Malkan and Isacson were thereafter disqualified as attorneys for plaintiff due to Isacson's earlier representation of the first defendant. Malkan later formed a partnership with Ellner and the question arose whether they were also disqualified to represent a second plaintiff, who attempted to retain the new firm, due to Isacson's prior representation of the second defendant.

The court held that the new firm was not disqualified because the presumption of access to confidential information, posited against attorneys Malkan and Ellner, had been rebutted during a hearing. Although this presumption was irrebuttable in the case of Isacson and Malkan, the court would not apply the conflict rules rigorously *ad infinitum,* but would allow a later association to prove that a conflict did not exist.[21] Appellant submits that, analogously, even if the fact of joint office space were sufficient to raise a presumption of conflict, this presumption must be rebuttable and that appellant was entitled to a full hearing for that purpose. Appellant was denied such a hearing [RTD 10, 17-18].

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[19]A.B.A. Formal opinion 104 and *In re Ridgely* (1954 Del.), 106 A. 2d 527 are often cited but are clearly distinguishable from the present case.

[20]*Laskey Bros. v. Warner Bros. Pictures* (2d Cir. 1955), 224 F. 2d 824, cert. den. 350 U.S. 932.

[21]*Id.,* 224 F. 2d at 827.

II.

The District Court Erred by Not Allowing Appellant a Full Hearing on Appellee's Motion to Disqualify.

Generally a motion is the proper procedure for bringing before the court a question of disqualification.[22] The court may order a hearing on a motion for disqualification either before itself or before a Special Master.[23] At the District Court hearing in the present matter attorney West requested a hearing to take evidence [RTD 10, 17-18] but the Court took the matter under submission and made its order without further proceedings. Although the question seems to be one of first impression, appellant contends that the District Court erred and abused its discretion in not permitting appellant a full hearing. Appellant has argued in this brief that the alleged facts contained in attorney Olson's affidavit were almost non-existent and that, in any event, the District Court should not have followed the rigid rules advocated by appellee concerning office-sharing attorneys. Under these circumstances, and particularly when a more liberalized rule of law is involved which by necessity calls for certain factual determinations by the Court, appellant submits that he should have had the right, for exaple, to cross-examine attorney Olson, to introduce the full transcript of appellant Smith's testimony before the Bar Association [CT 17-18], to examine Mr. Young regarding the nature of their office association. As stated by Mr. West during the District Court hearing this and other evi-

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[22]*International Brotherhood of Teamsters v. Hoffa* (D.D.C. 1965), 242 F. Supp. 246, 257.

[23]Procedure followed in *Consolidated*, footnote 13, *ante* p. 12, *Laskey*, footnote 19, *ante* p. 14.

dence should have been taken since "basically we have involved my right to practice law" [RTD 10]. It is true that the core issue before Judge Ferguson was whether appellant Smith had the right under this Court's mandate to retain attorney Young, but the collateral question of attorney Young's right to practice law was and must be involved to some extent. If attorney West is to be denied his right to represent appellant, appellant requests that he at least be allowed to cross-examine the moving parties and to subsequently present an adequate record to this Court.

Conclusion.

For the reasons stated it is respectfully submitted that that part of the District Court's order disqualifying attorney George O. West be reversed and the cause remanded to the District Court for trial or, in the alternative, a full hearing on appellee's motion.

GEORGE O. WEST,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE O. WEST

APPENDIX A.

Canon 6.

Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. With the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Canon 37.

Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are

other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.